

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of VERNA ENGLISH, Deceased.

JACKIE HOLLY, Personal Representative of the
Estate of VERNA ENGLISH, Deceased,

UNPUBLISHED
March 9, 2004

Plaintiff-Appellee,

v

No. 243693
Washtenaw Circuit Court
LC No. 2000-000861-NI

COUNTY OF WASHTENAW,

Defendant-Appellant.

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In lieu of granting leave to appeal, our Supreme Court remanded this matter to this Court for consideration as on leave granted. Defendant appeals an order that partially denied its motion for summary disposition on plaintiff's claim under the motor vehicle exception to governmental immunity. We reverse.

I. Facts and Procedural History

On the morning of October 23, 1999, Washtenaw County Sheriff Deputies Kevin Hause and Edward Kovachs investigated an armed robbery at a Dairy Mart store on Grove Road in Ypsilanti Township. While they were at the store, Matthew Ruminski, a civilian motorist, approached Deputy Hause and told him that a woman, later identified as Verna English, was walking in the middle of the road. Mr. Ruminski later reported that he did not see Ms. English in the road and had to swerve at the last second to avoid hitting her with his car. Mr. Ruminski drove back and forth a few times to check on Ms. English and, though he was looking for her in the roadway, Mr. Ruminski twice was unable to see Ms. English in the road. Just minutes before the accident at issue, another driver, James Scheel, nearly hit Ms. English. Mr. Scheel swerved into another lane after Ms. English deliberately walked into the path of his oncoming vehicle.¹

¹ The record shows that Ms. English had a "high level of cocaine in her system at the time of
(continued...)

Approximately ten to fifteen minutes after Mr. Ruminski reported seeing someone in the road, Deputies Hause and Kovachs finished their work on the robbery investigation and left the store. According to Deputy Hause, he forgot about Ruminski's statement and, as Hause drove his patrol car down Grove Road in the dark, he did not see Ms. English in the roadway. Ms. English was walking in the dark, on a poorly lit portion of the road, while wearing a black jacket, black jeans, black shoes, and a black hat. Though it is undisputed that Deputy Hause was driving at or below the posted speed limit of thirty-five miles per hour and that the patrol car's headlights were on, Hause's patrol car struck Ms. English and she died as a result of the impact. At the time of the accident, it was dark outside and the "[o]vercast sky blocked all moon light." Also, large trees blocked any illumination from the nearest street light, at the next intersection.

In July 2000, plaintiff, as personal representative of decedent's estate, filed her complaint against Washtenaw County, the Washtenaw County Sheriff's Department, and Deputy Hause. The parties later stipulated to the dismissal of Deputy Hause and the Washtenaw County Sheriff's Department. In August 2001, defendant, Washtenaw County, filed a motion for summary disposition and the trial court granted the motion on all of plaintiff's claims except her allegation that defendant is liable under the motor vehicle exception to governmental immunity.

Defendant filed an application for leave to appeal and this Court denied the application on December 20, 2001. Defendant then filed an application in our Supreme Court and, as noted, in lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted.

II. Standard of Review and Applicable Law

Defendant contends that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(7). As this Court explained in *Poppen v Tovey*, 256 Mich App 351, 353-354; 664 NW2d 269 (2003):

An order granting summary disposition under MCR 2.116(C)(7) is reviewed de novo on appeal. *Pusakulich v Ironwood*, 247 Mich App 80, 82-83; 635 N.W.2d 323 (2001). In reviewing the order, we must give consideration to the affidavits, depositions, admissions, and other documentary evidence filed by the parties, and determine whether they indicate that defendants are in fact entitled to immunity. *Id.* If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." There are five statutory exceptions to this broad grant of immunity, including the motor vehicle exception, MCL 691.1405, which provides:

(...continued)

death." According to the evidence presented, Ms. English had a habit of walking in the middle of the road, despite warnings not to do so.

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in [the Motor Vehicle Code, MCL 257.1, *et seq.*]

“This Court must broadly apply governmental immunity and narrowly draw its exceptions.” *Carr v City of Lansing*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 240869, issued 11/06/03), slip op at 2.

III. Analysis

In its motion for summary disposition, defendant argued that, because no evidence showed that Deputy Hause operated his police car in a negligent manner or that Ms. English was injured as a direct result of that negligent operation, plaintiff’s claim is barred by governmental immunity. In response, plaintiff argued that, regardless whether Deputy Hause drove his vehicle above the speed limit or in an otherwise reckless manner, lighting conditions were adequate to see Ms. English and other drivers were able to avoid her. Therefore, according to plaintiff, Deputy Hause must have been driving negligently because he struck Ms. English with his vehicle.

As defendant points out, plaintiff did not submit any documentary evidence to support these arguments. Rather, plaintiff relied on a comment made by Ms. English’s companion on the evening of the accident, Joseph Halton, that appears in the evidence supplied by defendant. Specifically, at his deposition, Mr. Halton stated that, when he was walking with Ms. English, visibility was clear enough so that he could see several houses away and the street light was bright. Evidence also established that Mr. Halton was walking at some distance ahead of Ms. English and that he did not actually see the accident.² Further, as noted, other drivers nearly hit Ms. English before they saw her and one driver failed to see her when he was actively looking for her in the roadway. Nonetheless, according to plaintiff, Mr. Halton’s statement, along with the fact that other drivers avoided a collision with Ms. English, establishes that Deputy Hause operated his patrol car in a negligent manner.

Were we to accept as true Mr. Halton’s assessment of the lighting conditions along Grove Road, this evidence does not establish that Deputy Hause drove his vehicle in a negligent manner or that Ms. English was injured as a direct result of negligent operation of a motor vehicle. Our Supreme Court has specifically held that a narrow construction of the motor vehicle exception compels the conclusion “that the ‘operation of a motor vehicle’ encompasses activities that are directly associated with the driving of a motor vehicle.” *Chandler v Cty of Muskegon*, 467 Mich 315, 321; 652 NW2d 224 (2002). As our Supreme Court also emphasized in *Robinson v City of Detroit*, 462 Mich 439, 457; 613 NW2d 307 (2000), decisions made by an officer that are “separate from the operation of the vehicle itself” are “not encompassed within the narrow construction of the phrases ‘operation of a motor vehicle.’ ” In so holding, the Supreme Court

² Mr. Halton was also under the influence of alcohol and crack cocaine at the time of the incident.

agreed with Justice Taylor's dissent in *Rogers v City of Detroit*, 457 Mich 125, 159-160; 579 NW2d 840 (1998), in which he opined that "[a] narrow construction of the term 'operation of a motor vehicle' would include the manner in which the police vehicle is driven . . ." and, thus, an officer's choice to pursue a fleeing vehicle does not fall within the exception. This Court echoed this reasoning in both *Chandler, supra* and *Regan v Washtenaw Road Comm'rs (On Remand)*, 257 Mich App 39, 49; 667 NW2d 57 (2003), and stated that, to be actionable under the motor vehicle exception, the alleged injuries must be directly caused by the "manner of operation" of the vehicle.

In her complaint, plaintiff alleged that Deputy Hause operated his vehicle "in a negligent and reckless manner in violation of MCL 691.1405." However, when challenged to produce evidence regarding the deputy's operation of the vehicle in response to defendant's motion for summary disposition, plaintiff produced no evidence to establish an issue of fact that Deputy Hause drove his patrol car in a negligent manner. Indeed, with regard to the manner of operation of the vehicle, there is no allegation, let alone jury submissible evidence, that Deputy Hause operated his patrol car without headlights, above the posted speed limit, or in an otherwise careless fashion. Rather, plaintiff merely asserted that the fact of the injury was sufficient to create an issue of fact regarding Deputy Hause's negligence. Negligence may be established through circumstantial evidence, but requires more than speculation or conjecture, defined as "simply an explanation consistent with known facts or conditions." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Similarly, a theory that is factually supported but no more possible than any other theory is equally insufficient. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

Plaintiff's assertions are insufficient to bring plaintiff's claim within the narrow application of the motor vehicle exception and no reasonable juror could conclude from the evidence that Deputy Hause operated his vehicle in a negligent manner. Plaintiff offers nothing more than pure speculation that, because his vehicle struck Ms. English, Deputy Hause must have operated his car in a negligent manner. Again, the mere fact of the injury is not enough to create an issue of fact regarding Deputy Hause's manner of operating his vehicle; the injury itself is one element of the action, and a showing of negligent operation is another. *Regan, supra* at 46. Further, we agree with defendant that the issue whether Deputy Hause forgot about or decided to act on Ruminski's report is not encompassed by the motor vehicle exception. Without some evidence regarding the deputy's actions that are "directly associated with the driving of a motor vehicle," plaintiff's claim must fail.

To reiterate, the evidence presented established that at about 6:45 a.m., Mr. Ruminski nearly struck Ms. English with his vehicle while she was walking in the road. Ruminski stated that he was unable to see Ms. English until he almost struck her. Another motorist, Mr. Scheel, also reported that he nearly struck the decedent while she was walking in the road at approximately 7:00 a.m. The crash report indicates that, at the time of the accident, approximately 7:04 a.m., the lighting conditions were "Dark-Unlighted" and that illumination from the closest street lights was blocked by trees and the overcast sky blocked any moon light. The record further reflects that Ms. English was dressed all in black and that Mr. Ruminski was unable to see the decedent just before the accident, though he was looking for her in the road. Again, evidence established that Deputy Hause drove his patrol car at a rate under the posted speed limit of thirty-five miles per hour and no evidence of negligent operation was alleged.

For these reasons, the trial court erred by failing to grant defendant's motion for summary disposition under MCR 2.116(C)(7). Because defendant was entitled to dismissal on this basis, we need not address defendant's remaining claims.³

Reversed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra

³ We note, however, that defendant erroneously argues that Deputy Hause owed no duty to Ms. English because the public duty doctrine shields police officers from liability to individual plaintiffs unless the individual plaintiff satisfies the elements of a "special relationship" exception. Under the public-duty doctrine in Michigan, police officers are not liable for failing to provide police protection to individual plaintiffs absent a special relationship. *White v Beasley*, 453 Mich 308, 316; 552 NW2d 1 (1996). Our Supreme Court later pointed out that "*White* offered relatively little guidance to lower courts regarding the scope of the doctrine recognized in that case." *Beaudrie v Henderson*, 465 Mich 124, 133; 631 NW2d 308 (2001). However, although the Supreme Court in *Beaudrie* was primarily concerned with whether to extend the public duty doctrine, *id.* at 126, at issue was, notably, whether to extend the doctrine to "cases other than those alleging a failure to provide police protection from the criminal acts of a third party." *Id.* at 133-134. Furthermore, the Supreme Court specifically rejected a "reformulation" of the public duty doctrine into "a grant of common-law governmental immunity." *Id.* at 135, 137. The Supreme Court concluded that "a traditional common-law duty analysis provides a far more familiar and workable framework for determining whether a public employee owes a tort-enforceable duty in a given case." *Id.* at 138. To the extent that defendant argues that the public duty doctrine precludes Deputy Hause from owing any duty to the decedent absent a "special relationship," that argument has been specifically rejected by the Supreme Court. The trial court correctly found that the public duty doctrine does not apply.